

88-152

NO. (1)

Supreme Court, U.S.

FILED

JUL 26 1988

JOSÉ F. GARNOL, JR.
CLERK

In the
Supreme Court of the United States

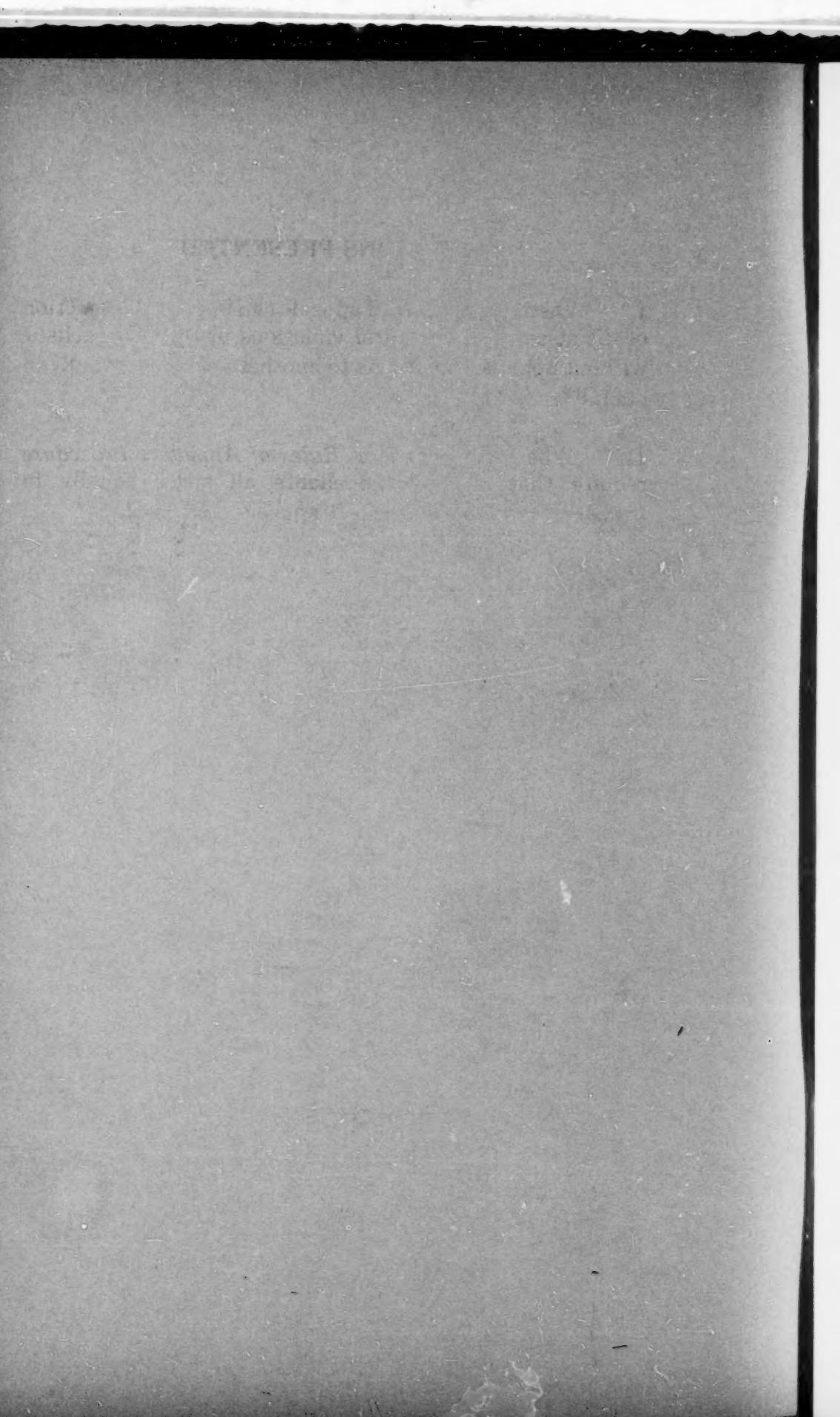
IN RE: All American Services, Ltd.,

Petitioner

PETITION FOR A
WRIT OF MANDAMUS

CHRIS J. ROY
(A LAW CORPORATION)
711 Washington Street
Alexandria, Louisiana 71301
Telephone: (318) 487-9537

ATTORNEY FOR PETITIONER,
ALL AMERICAN SERVICES, LTD.



QUESTIONS PRESENTED

- I. Whether the court of appeals can impose the sanction of dismissal for procedural violations upon one appellant without applying sanctions to another appellant equally in default?
- II. Whether the *Federal Rules of Appellate Procedure* require that multiple appellants all share equally in transcript costs or have their appeals dismissed.
- III. Whether a dismissal of an appeal by a court of appeals for a procedural violation from which no prejudice has resulted is permissible when the dismissal is in conflict with the same court's rule that no procedural dismissal shall occur absent prejudice to other parties involved.

LIST OF PARTIES TO PROCEEDING

PLAINTIFFS-CROSS APPELLANTS

Edward C. Abell, Jr., and
Carey Walton, individually and
as representatives of a class of
Revenue Bond purchasers.

DEFENDANT-APPELLANTS

Joe E. Fryar
Wright, Lindsay & Jennings
Valley Forge Insurance Company
All American Services Company, Ltd. (Petitioner)

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OPINIONS BELOW

The Judgment of the United States District Court for the Western District of Louisiana, Lafayette Division is unreported and is included in the appendix at A-1. The Order of Dismissal by the Clerk of the United States Court of Appeals for the Fifth Circuit is unreported and is included in the appendix at A-5 to A-7. The Orders of the United States Court of Appeals for the Fifth Circuit denying reinstatement of Petitioner's appeal are unreported and are included in the appendix at A-8 and A-9.

JURISDICTION

The Order of the Clerk of the United States Court of Appeals for the Fifth Circuit dismissing Petitioner's appeal from the Judgment of the United States District for the Western District of Louisiana was entered on August 19, 1987. The Order of the court of appeals denying Petitioner's motion for reinstatement, Johnson, J. was entered December 19, 1987. The Order of the court of appeals sitting in panel denying Petitioner's motion for reinstatement was entered February 5, 1988. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1651.

STATUTES AND RULES INVOLVED

<i>Fed. R. App. P.</i> 10(a,b), <i>5th Cir. Loc. R.</i> 10 and Internal Operating Procedures [I.O.P.]	A-10
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28 U.S.C. § 753(b)	A-14

STATEMENT OF THE CASE

Judgment was entered against the defendants-

Petitioner; Fryar; Wright, Lindsay & Jennings (hereinafter referred to as WLJ); and Valley Forge Insurance Company--upon a jury verdict. At the time, WLJ and Valley Forge had the same counsel, while Petitioner and Fryar each had separate counsel. Judgment against Petitioner individually or jointly with other defendants was in excess of \$10,000,000. Timely notices of appeal were filed by defendants.

Substantial error has been alleged, including the fact that the trial court permitted a tampered jury to remain seated and to render the verdict. Plaintiff/appellees cross appealed, seeking a higher award.

Transcript orders were filed by counsel for Fryar and WLJ ordering transcripts and indicating that payment arrangements had been made (A-17 & A-19). Petitioner's counsel filed a transcript order on May 6, 1987, stating that no transcript was necessary and indicating that payments were to be apportioned among the "four defendants" (A-21). Two days later, on May 8, 1987, counsel for Petitioner informed the reporter that he would borrow a transcript copy in lieu of ordering one. The Clerk approved so long as the other defendants knew they were bearing the cost (A-23). Following the filing of the transcript orders, but before the dismissal at issue, Valley Forge retained its own separate counsel.

On May 21, 1987, counsel for Fryar informed the Clerk that Fryar would pay no more than a one-fourth (1/4) share of the transcript cost, prorated among the four defendants (A-24). However, once the preparation of the 39-volume transcript began in June, plaintiffs, Fryar and WLJ paid one-third (1/3) each for the costs as portions were completed. Ultimately, the entire transcript cost was paid in this manner. Neither Petitioner nor Valley Forge contributed.

On June 17, 1988, the Clerk of the court of appeals wrote to Petitioner to enforce Petitioner's participation in the transcript costs, saying that Petitioner would be barred from citing to the transcript and threatening dismissal. The Clerk asked for a response before the transcript was due to be filed, July 30, 1987 (A-25). No such letter was sent to Valley Forge. The time for filing the transcript was extended and no response was made by Petitioner to the Clerk.

On August 4, 1987, the appellees asked the Clerk to dismiss Petitioner's appeal, which the Clerk did on August 19, 1988 (A-2). The transcript was not filed until August 27, 1987.

Thereafter, Petitioner attempted to cure the assessed default by paying the claimed shares to Fryar and WLJ and by making tender to appellees, who refused to accept. Petitioner's motion to reinstate was denied on December 18, 1987, despite the fact that appellees' brief was not due until February 8, 1988. Sole opposition to the motion came from the appellees. The Fifth Circuit in panel denied the motion on February 5, 1988. At no time from the filing of the notices of appeal up to the making of this Petition has Valley Forge paid any transcript costs, yet Valley Forge remains a party to the appeal with no sanctions threatened or imposed by the Clerk or the court of appeals itself. Certiorari is now sought on the basis that the Fifth Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. *Sup. Ct. R.* 17.1(a).

ARGUMENT

I. THE FIFTH CIRCUIT'S APPLICATION OF THE FEDERAL AND LOCAL RULES OF APPELLATE PROCEDURE, USED TO DISMISS PETI-

TIONER'S APPEAL, WAS NOT UNIFORM
WITHIN THE CASE AND CONSTITUTED UN-
EQUAL ADMINISTRATION OF THE LAW.

Certiorari can be granted where there has been a threat to the uniform application of rules of procedure and an inequitable administration of the law. *Hanna v. Plummer*, 380 U.S. 460 (1965). The violation of procedural standards has resulted in the granting of certiorari. *Chapman v. United States*, 365 U.S. 610 (1961) (admissibility of evidence).

A. Discrimination between Petitioner and a Co-appellant.

Petitioner did not pay transcript fees; thus its appeal was dismissed by the Clerk. Valley Forge paid no fees, yet no sanctions were threatened or imposed. Petitioner made or tendered full payment of its alleged share prior to the ruling on its motion for reinstatement, which motion was nonetheless denied. Valley Forge has never tendered any payment in any sum, yet it remains a participant to the proceedings. Such a disparity in treatment of two appellants in the same action seeking review of a \$10,000,000 judgment is arbitrary, capricious, and inequitable; it far departed from the usual conduct of judicial proceedings.

B. Discrimination between Petitioner and Appellees.

Equivalent disparity is evident in the treatment accorded by the Clerk to appellees on the one hand and Petitioner on the other.

The original plan was for the four defendants/appellants to bear the cost pro rata. Then the plaintiffs cross appealed, and, as cross-appellants, they bear an equal burden for the record and the transcript.

After discussing the designation provisions of *Fed. R. Civ. P.* 75, 7 J. Moore, *Moore's Federal Practice* ¶ [3.-4]

at 75-20 (2d ed. 1982) notes: "A cross-appeal places on the cross-appellant the same duty to designate portions of the transcript as is described above."

In *Schuldes v. National Security Corp.*, 27 Ariz. App. 611, 557 P.2d 543 (1976), the court dealt with an adopted identical version of *Fed. R. Civ. P.* 75. When the record proved insufficient to make a full determination, the court held that "[a] complete record is the responsibility of the appellee-cross-appellant . . ." 557 P.2d at 550.

With equal duties imposed on appeal, logic dictates that the collective cross-appellants share the transcript costs equally with the collective appellants. Apportionment of the cost by assigning 50% to appellants and 50% to cross appellants is the only equitable division possible. For example, in a case involving 99 appellants and one cross-appellant, numerical proration would result in the cross-appellant bearing only 1% of the cost. Assuming that equal proration between the four appellants would have been proper, Petitioner would have been assessed $\frac{1}{4}$ of $\frac{1}{2}$ of the total transcript cost of 12.5%. The cost of the transcript was \$14,500. Petitioner's maximum share thus would have been \$1,812. The Clerk's computations held the Petitioner to a payment of twice that amount or \$3,625; with four appellants and two cross-appellants the Clerk sought to charge Petitioner $\frac{1}{4}$ of the whole cost.

Plaintiff/cross-appellants' share of 50% of the cost would have been \$7,250, yet they only paid 33- $\frac{1}{4}$ % or the sum of \$4,833, leaving a balance due of \$2,417, a deficiency twice as large as that owed by Petitioner. Despite this substantial deficiency owed to the transcript fund, cross-appellants were able to cause Petitioner's appeal to be dismissed.

Once again, the Fifth Circuit misapplied the rules to

the substantial detriment of one party, this time in favor of the defaulting plaintiffs possessed with a \$10,000,000 judgment and suffering from no prejudice.

This question, involving the Fifth Circuit's dismissal of an appeal for appellant's failure to pay an excessive share of transcript costs at the request of a defaulting appellee while permitting a defaulting co-appellant to proceed without sanctions, is unique. The propriety of the Fifth Circuit's refusal to reinstate the appeal after payment or tender of the Petitioner's excessive share, while the defaulting co-appellant has never paid but was permitted to proceed, presents a similarly unique issue. Here the Fifth Circuit refused to reinstate despite there being no prejudice to the defaulting cross-appellants who declined the tender and opposed the motion.

These questions present a substantial issue of uniform application of the rules, an issue created by the Fifth Circuit's unprecedented departure from the accepted practice of fair and impartial appellate procedure.

II. ONCE ARRANGEMENTS HAVE BEEN MADE FOR THE PAYMENT OF TRANSCRIPT COSTS, THE CLERK CANNOT REAPPORTION CONTRIBUTION UNDER THREAT OF DISMISSAL WITHOUT MISAPPLYING AND VIOLATING THE RULES OF PROCEDURE.

Dismissal of a complaint for procedural violations can raise important questions regarding the proper application of Federal Rules of Procedure and will warrant granting of certiorari. *La Buy v. Howes Leather Co.*, 352 U.S. 249, 250-51 (1957).

Petitioner, along with three other defendants, appealed from a judgment in excess of \$10,000,000 resulting

from a verdict rendered by a tampered jury.

Petitioner's appeal was dismissed by the Clerk of the Fifth Circuit under 5th Cir. R. 42.3.2, which provides for dismissal for want of prosecution, for failure to order a transcript of the trial.

The requirements governing the ordering of a transcript are governed by 5th Cir. R. 10.1, which provides in relevant part that the transcript order "shall be on a form prescribed by the clerk" and further provides that "*if no transcript is ordered, appellant shall file with the clerk a copy of the certificate to that effect . . .*" (emphasis added). The official form for the transcript order prescribed by the Clerk of the Fifth Circuit specifically provides a place for an appellant to elect not to order a transcript.

Furthermore, the Internal Operating Procedures for the Fifth Circuit state that "[t]he plan is to provide for the relationship with litigants to [that] specified in the Court Reporter Act, including fees charged for transcripts . . ." 5th Cir. R. 11.1 [I.O.P.]. The relevant portion of the Court Reporter Act, 28 U.S.C. § 753(b), provides that the reporter is required to prepare a transcript only "[u]pon the request of any party . . . who has agreed to pay the fee therefor." 28 U.S.C. § 753(b).

Fed. R. App. P. 10(b) addresses the case of a single appellant; the function of the rule is to provide the courts of appeal with a record of the proceedings below. The rule does not address the question of multiple appellants, and nowhere can there be found any support for the Clerk's position that every appellant must participate in the transcript fees or suffer the extreme sanction of dismissal. As long as a transcript is ordered and paid for, the matter of apportionment of costs is between the parties themselves. This has been recognized both in the rules and by the Clerk himself.

5th Cir. R. 10.1 and the form prescribed by the Clerk provide an appellant with the opportunity to decline to order a transcript. In the Clerk's letter to Petitioner's counsel, the Clerk acknowledged that Petitioner was not obligated to order a transcript so long as another party or parties paid. In this case, the costs in fact were paid. 28 U.S.C. § 753(b) directs simply that the transcript be given to whoever pays for it, and the providing of the transcript under 28 U.S.C. § 753(a) must meet the preparation and transmission requirements of *Fed. R. App. P. 11* and *5th Cir. R. 11*.

The purpose of the rules and 28 U.S.C. § 753(a) is to ensure that transcripts are provided to the Fifth Circuit and that the reporters get paid for their work. Many cases involving multiple appellants have primary and secondary defendants. If the appeal is important enough for one appellant to bear the costs, his co-appellants are entitled to take advantage of that situation, so long as one appellant is prepared to bear the costs of the transcript alone. The rules neither authorize nor direct the Clerk to act as a collection agent for the parties bearing a larger share of the costs. The payment of the cost had been arranged; the requirements of *Fed. R. App. P. 10* were therefore met. Dismissal of Petitioner's appeal violated the rules of court.

The important question presented herein in the administration of lower courts and the uniform application of the rules is whether the Clerk can force reapportionment of costs between co-appellants to require pro rata contribution, even though arrangements for the costs have been made by the parties themselves; furthermore, whether the Clerk is then empowered to dismiss the appeal of petitioner with prejudice in the absence of obedience to the Clerk's proration.

III. DISMISSAL OF AN APPEAL FOR A PROCEDURAL RULE VIOLATION NOT RESULTING IN ANY PREJUDICE TO ANY PARTY IS IN DIRECT CONFLICT WITH THE RULE OF THE FIFTH CIRCUIT THAT SUCH DISMISSALS SHALL NOT OCCUR UNLESS PREJUDICE RESULTED FROM THE ERROR.

The order at issue conflicts with another decision in the Fifth Circuit.

Conflicts between decisions of a court of appeals create a basis for the granting of certiorari. *Federal Power Commission v. Texaco, Inc.*, 377 U.S. 33, *rehearing denied*, 377 U.S. 974 (1964).

In *Marcaida v. Industrial Indemnity Insurance Co.*, 569 F. 2d 829 (5th Cir. 1978), the late filing of a brief, rather than the failure timely to make arrangements for the payment of a share of the transcript, raised the possibility of dismissal as a sanction. However, the principles involving the application of the rules and the powers of default are the same.

In *Marcaida*, in violation of *Fed. R. App. P.* 27(a), appellants' counsel consistently failed to serve opposing counsel with motions for extensions of time to file appellant's brief. Appellee moved to dismiss, but the Fifth Circuit denied the motion, stating: "Despite this performance by counsel for plaintiffs-appellants, appellee can point to no prejudice flowing to him." *Id.* at 830.

In this case as well, there has been no showing of prejudice by any party. Arrangements had been made for payment of the transcript, and the transcript was being prepared, delivered, and paid for throughout the summer of 1987. At the time of dismissal of Petitioner's appeal, the

entire 39-volume transcript was only five working days away from being filed with the court. As of August 19, 1987--the date of dismissal--the schedule for filing of briefs had not yet been fixed. Furthermore, Petitioner sought to cure the claimed deficiency by paying or tendering the sums claimed due by the Clerk to the various counsel involved. Nonetheless, reinstatement was denied on December 18, 1987, despite the fact that the appellees' brief was not even due until February 8, 1988.

Petitioner's lack of participation in transcript preparations created neither procedural nor substantive prejudice to any of the other parties. Whatever financial inconvenience Petitioner may have occasioned regarding the transcript cost was cured by its tender of its full pro rata share prior to the reinstatement request.

No prejudice having been occasioned, the legal cost to Petitioner is vastly disproportionate to the negligible inconvenience caused. Petitioner has now suffered a final judgment totaling more than \$10,000,000 as a result of a verdict rendered by a tampered jury. The decision to dismiss and the refusal to reinstate despite the complete absence of prejudice is in direct conflict with the Fifth Circuit's decision in *Marcaida*.

CONCLUSION

For the foregoing reasons, the Petitioner, All American Services Company, Ltd., respectfully requests this Court to issue a writ of mandamus to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

CHRIS J. ROY (A LAW CORPORATION)
711 Washington Street
P. O. Box 1911
Alexandria, Louisiana 71301
Telephone: (318) 487-9537

BY: _____
CHRISTOPHER J. ROY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT a copy of the foregoing application for writ of mandamus has been served upon the Honorable, Court of Appeal, Fifth Circuit, New Orleans, Louisiana, the Honorable Sam D. Johnson, United States Circuit Judge, United States Court of Appeals, Fifth Circuit, New Orleans, Louisiana and upon counsel of record on this 25 day of July, 1988.

CHRISTOPHER J. ROY
ATTORNEY FOR PETITIONER,
ALL AMERICAN SERVICES, LTD.

COUNSEL OF RECORD TO BE SERVED

Stone, Pigman, Walther, Wittmann & Hutchinson
546 Carondelet Street
New Orleans, Louisiana 70130-3588

Voorhies & Labbe
Post Office Box 3527
Lafayette, Louisiana 70502

Liskow & Lewis
50th Floor
One Shell Square
New Orleans, Louisiana 70139

J. Minos Simon, Ltd.
1408 West Pinhook Road
Lafayette, Louisiana 70505

APPENDIX A
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

Filed

Feb 19 1987

EDWARD C. ABELL, JR., *ET AL.* * CIVIL ACTION

VERSUS * NO. 84-1786

POTOMAC INSURANCE COMPANY OF ILLINOIS, *ET AL.* * SECTION "O"

* * * * * * * * * * * MAGISTRATE

* * * * * * * * * * * DIVISION

JUDGMENT

This action came on for jury trial before the Court on December 8, 1986, with the Honorable John M. Shaw, District Judge presiding, and the issues having been duly tried and a verdict having been duly rendered in favor of plaintiffs on February 4, 1987;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of plaintiffs, Edward C. Abell, Jr. and Carey Walton, and the class of purchasers of Westside Habilitation Center Revenue Bonds, and against defendants Joe E. Fryer, All American Services Company, Ltd., Wright, Lindsey and Jennings and Valley Forge Insurance Company jointly and severally in the full and true sum of \$6,715,800, together with interest thereon at the rate of 12% from July 5, 1984, the date of judicial demand, until payment, together with taxable court costs and attorneys' fees as set forth below.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of all plaintiffs and against defendants Joe E. Fryar, All American Services Company, Ltd., Wright, Lindsey & Jennings and Valley Forge Insurance Company *in solido* in the

full and true sum of \$1,540,000, with interest thereon at the rate of 12% per annum from date of judicial demand until date of payment, together with taxable court costs and attorneys' fees as set forth below. This portion of the judgment is a part of and encompassed within the award made in the above paragraph. Hence, if recovery is had under the award made in the above paragraph, this portion of the judgment is duplicative and shall not be exigible.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of all plaintiffs and against defendants, Joe E. Fryar and All American Services Company, Ltd., jointly and severally in the full and true sum of \$2,550,000, together with interest thereon from date of this judgment until date of payment, together with all costs of the suit and attorneys' fees as set forth below.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of all plaintiffs and against All American Services Company, Ltd. in the full and true sum of \$2,950,000, together with interest thereon from date of this judgment until date of payment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of all plaintiffs and against Wright, Lindsey and Jennings and Valley Forge Insurance Company *in solido* in the full and true sum of \$300,000, together with interest thereon at the rate of 12% from date of judicial demand until date of payment, together with all costs of these proceedings. This portion of the judgment is also encompassed within and a part of the award made in the first paragraph. Hence, if recovery is had under the award made in the first paragraph, this portion of the judgment is duplicative and shall not be exigible.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of all plaintiffs and against Joe E. Fryar, All American Services Company, Ltd., Wright, Lindsey & Jennings, and Valley Forge Insurance, *in solido*, in the full and true sum of \$2,567,323.80, representing reasonable attorneys' fees, together with taxable costs of this proceeding to be determined upon the plaintiffs' submission of their bill of costs. Of this amount, only \$2,117,323.00 shall be payable to counsel for plaintiffs and the balance shall be paid to the plaintiffs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of plaintiffs and against Joe E. Fryar and All American Services Company, Ltd. *in solido* for the full and true sum of \$263,743.00, representing costs and expenses of this litigation compensable under the RICO statute but not taxable under 28 U.S.C. 1920. Of this amount, \$64,071.29 shall be payable to counsel for plaintiffs and the balance shall be paid to plaintiffs.

OPELOUSAS, LOUISIANA, this 19 day of February, 1987.

ROBERT H. SHEMWELL,

Clerk of Court, United States
District Court for the Western
District of Louisiana

BY: Mildred Baker

Mildred Baker, Deputy Clerk

Approved as to form:

/s/ John M. Shaw

John M. Shaw, United
State District Judge

Date Feb 20 1987

Judgment entered 2-19-87

By Rita V. Watkins

| | | |
|------------|---------------|---------------|
| Notice to: | Wittman | Goudelocke |
| | Ousis | Weems, III |
| | Hamilton III | Staffard, Jr. |
| | Provosty, Jr. | Frankhauser |
| | Odom | Nunnally, III |
| | Smith | Downing |
| | Humphries, Jr | Welch |
| | Breaux | Davidson |
| | Sommer | Munsterman |
| | Stahl | Mayer |
| | Bienvenu | Schomp |
| | Melichar | Simon |
| | Alltmont | |

APPENDIX B
United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK

August 19, 1987

Gilbert F. Ganuchea
Clerk

Tel. 504-589-6514
600 Camp Street
New Orleans, La. 70130

Mr. Robert H. Shemwell, Clerk
U.S. District Court
500 Fannin St., Rm. 106
Shreveport, LA 71101

No. 87-4260-ABELL -vs- POTOMAS.
(CA 84 1786 "O")

- Enclosed to you only is a certified copy of the judgment of this Court in the above case issued as and for the mandate as to All American Services Co., Ltd. ONLY.*
- The Court having denied the motion for stay of mandate, enclosed to you only is a certified copy of the judgment of this Court in the above case issued as and for the mandate.
- Having received from the Clerk of the Supreme Court a copy of the order of that Court denying certiorari, I enclose a certified copy of the judgment of this Court in the above case, issued as and for the mandate.
- We have received a certified copy of an order of the Supreme Court denying certiorari in the above cause. This Court's judgment as mandate having already been issued to your office, no further order will be forthcoming.

Enclosed herewith are the following additional documents:

- Copy of the Court's opinion.
- Original record on appeal or review. ____ Volumes.

- Other original papers forwarded with record
____ Envelope ____ Box.
- Bill of Costs approved by this Court. Copy enclosed to counsel.

cc:and copy of order to:

Mr. J. Minos Simon
Mr. D. Mark Bienvenu
Mr. Leslie R. Leavoy, Jr.
Mr. Phillip A. Wittman

Sincerely,

GILBERT F.
GANUCHEAU, CLERK

By:/s/Andrew Rondeno
Deputy Clerk

*Appeal remains open as to other
appellants & cross-appellants.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87 4260

EDWARD C. ABELL, JR., ET AL.,

Plaintiffs-Appellees

versus

Cross-Appellants,

POTOMAS INSURANCE COMPANY, ETC., ET AL.,
Defendants,

JOE E. FRYAR, ET AL.,

Defendants-Appellants
Cross-Appellees,

SWINK & COMPANY, INC.

versus

Defendant-Third Party
Plaintiff,

ALL AMERICAN SERVICES CO., LTD.,

Third Party Defendant-
Appellant-Cross-Appellee.

Appeal from the United States District Court for the
Western District of Louisiana

CLERK'S OFFICE:

Pursuant to Local Rule 42.3, the appeal was duly entered dismissed as to All American Services ONLY for want of prosecution for failure of *appellant to order transcript and make financial arrangements with Court Reporter* within the time fixed by the rules, this 19th day of August 1987.

GILBERT F. GANUCHEAU
Clerk of the United States Court
of Appeals for the Fifth Circuit

By: /s/ Andrew Rondeno

DEPUTY CLERK
FOR THE COURT - BY DIRECTION

APPENDIX C
IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87 4260

Filed Dec 18 1987

EDWARD C. ABELL, JR., and CAREY WALTON

Plaintiffs-Appellees
Cross-Appellants,

versus

POTOMAS INSURANCE COMPANY, ETC., ET AL.,
Defendants,

JOE E. FRYAR, and WRIGHT, LINDSEY & JENN-
INGS and VALLEY FORGE INSURANCE
COMPANY,

Defendants-Appellants
Cross-Appellees,

SWINK & COMPANY, INC.

Defendant-Third Party
Plaintiff,

versus

ALL AMERICAN SERVICES CO., LTD.,

Third Party
DefendantCross-Appellee.

Appeal from the United States District Court for the
Western District of Louisiana

O R D E R:

IT IS ORDERED that the motion of All American Services Company, Ltd., to reinstate it's appeal is DENIED.

/s/ Sam D. Johnson

SAM D. JOHNSON
U. S. CIRCUIT JUDGE

12-16-87

APPENDIX D
IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87 4260

Filed Feb 5 1988

EDWARD C. ABELL, JR., and CAREY WALTON

Plaintiffs-Appellees
Cross-Appellants,

versus

POTOMAS INSURANCE COMPANY, ETC., ET AL.,
Defendants,

JOE E. FRYAR, and WRIGHT, LINDSEY & JENNINGS and VALLEY FORGE INSURANCE COMPANY,

Defendants-Appellants
Cross-Appellees,

SWINK & COMPANY, INC.

Defendant-Third Party
Plaintiff,

versus

ALL AMERICAN SERVICES CO., LTD.,

Third Party
DefendantCross-Appellee.

Appeal from the United States District Court for the
Western District of Louisiana

Before POLITZ, JOHNSON and HIGGINBOTHAM, Circuit Judges.

B Y T H E C O U R T :

A member of this panel has heretofore denied appellant's motion for reinstatement of this appeal. Upon consideration by this panel upon request of appellant. All American Services, IT IS ORDERED that appellant's motion to reinstate is DENIED.

FRAP 10. The Record on Appeal

(a) Composition of the Record on Appeal. The original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court shall constitute the record on appeal in all cases.

(b) The Transcript of Proceedings; Duty of Appellant to Order; Notice to Appellee if Partial Transcript is Ordered.

(1) Within 10 days after filing the notice of appeal the appellant shall order from the reporter a transcript of such parts of the proceedings not already on file as the appellant deems necessary, subject to local rules of the courts of appeals. The order shall be in writing and within the same period a copy shall be filed with the clerk of the district court. If funding is to come from the United States under the Criminal Justice Act, the order shall so state. If no such parts of the proceedings are to be ordered, within the same period the appellant shall file a certificate to that effect.

(2) If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant include in the record a transcript of all evidence relevant to such finding or conclusion.

(3) Unless the entire transcript is to be included, the appellant shall, within the 10 days time provided in b(1) of this Rule 10, file a statement of the issues the appellant intends to present on the appeal and shall serve on the appellee a copy of other parts of the proceedings to be necessary, the appellee shall, within 10 days after the service of the order or certificate and the statement of the

appellant, file within 10 days after service of such designation the appellant has ordered such parts, and has so notified the appellee, the appellee may within the following 10 days either order the parts or move in the district court for an order requiring the appellant to do so.

(4) At the time of ordering, a party must make satisfactory arrangements with the reporter for payment of the cost of the transcript.

LOCAL RULE

10.1. Ordering The Transcript—Duty of Appellant. Appellant's order for the transcript of proceedings, or parts thereof, contemplated by FRAP 10(b) shall be on a form prescribed by the Clerk, and a copy of such order form shall be furnished by counsel to the Clerk in addition to the other parties set out in FRAP 10(b). If no transcript is to be ordered, appellant shall file with the Clerk a copy of the certificate to that effect which counsel served on the parties under FRAP 10(b).

10.2. Form of Record. The record on appeal shall be bound in a manner which will facilitate reading with pages numbered consecutively by the Clerk of the District Court.

[I.O.P.— The district court will furnish a purchase order form as required by this Court when the notice of appeal is filed. In criminal appeals the district court will furnish a special form at the time of sentencing. Once purchase order has been completed and forwarded to the reporter, with adequate financial arrangements made, counsel's responsibility under the 1979 amendments to FRAP 10 and 11 will have been fulfilled.]

FRAP 11 Transmission of the Record

(a) Duty of Appellant. After filing the notice of appeal the appellant, or in the event that more than one appeal is taken, each appellant, shall comply with the provisions of Rule 10(b) and shall take any other action necessary to enable the clerk to assemble and transmit the record. A single record shall be transmitted.

(b) Duty of Reporter to Prepare and File Transcript; Notice to Court of Appeals; Duty of Clerk to Transmit the Record. Upon receipt of an order for a transcript, the reporter shall acknowledge at the foot of the order the fact that the reporter has received it and the date on which the reporter expects to have the transcript completed and shall transmit the order, so endorsed, to the clerk of the court of appeals. If the transcript cannot be completed within 30 days of receipt of the order the reporter shall request an extension of time from the clerk of the court of appeals and the action of the clerk of the court of appeals shall be entered on the docket and the parties notified. In the event of the failure of the reporter to file the transcript within the time allowed, the clerk of the court of appeals shall notify the district judge and take such other steps as may be directed by the court of appeals. Upon completion of the transcript the reporter shall file it with the clerk of the district court and shall notify the clerk of the court of appeals that the reporter has done so.

When the record is complete for purposes of the appeal, the clerk of the district court shall transmit it forthwith to the clerk of the court of appeals. The clerk of the district court shall number the documents comprising the record and shall transmit with the record a list of documents correspondingly numbered and identified with reasonable definiteness. Documents of unusual bulk or weight, physical exhibits other than documents, and such

LOCAL RULE

other parts of the record as the court of appeals may designate by local rule, shall not be transmitted by the clerk unless the clerk is directed to do so by a party or by the clerk of the court of appeals. A party must make advance arrangements with the clerks for the transportation and receipt of exhibits of unusual bulk or weight.

Rule 11. Transmission of the Record

11.1 Duties of Court Reporters—Extensions of Time.

The court reporter shall, in all cases in which transcripts are ordered, furnish the following information, on a form to be prescribed by the Clerk of the Court:

acknowledge receipt of the order for the transcript,

the date of receipt of the order for the transcript,

whether adequate financial arrangements under CJA or otherwise, have been made,

the number of trial or hearing days involved in the transcript, and an estimate of the number of pages,

the estimated date on which the transcript is to be completed,

a certificate that he or she expects to file the trial transcript with the District Court Clerk within the time estimated.

A request by a court reporter for enlargement of the time for filing the transcript beyond the 30 day period fixed by FRAP 11(b) shall be filed with the Clerk and shall specify in detail (a) the amount of work that has been accomplished on the transcript, (b) a list of all outstanding transcripts due to this and other courts, including the due dates of filing, and (c) verification that the request has been brought to the attention of, and approved by, the district judge who tried the case.

11.2. Duty of the Clerk. It is the responsibility of the

Clerk of the District Court to determine when the record on appeal is complete for purposes of the appeal. Unless the record on appeal can be transmitted to this Court within 15 days from the filing of the notice of appeal or 15 days after the filing of the transcript of trial proceedings if one has been ordered, whichever is later, the Clerk of the District Court shall advise the Clerk of this Court of the reasons for delay and request an enlarged date for the filing thereof.

11.1. Duties of Court Reporters—Extensions of Time

[I.O.P.—The monitoring of all outstanding transcripts, and the problems of delay in filing, will be done by the Clerk. Counsel will be kept informed when extensions of time are allowed on requests made by the court reporters.

On October 11, 1982 the Fifth Circuit Judicial Council adopted a resolution requiring each district court in the Fifth Circuit to develop a court reporter management plan that will provide for the day-to-day management and supervision of an efficient court reporting service within the district court. The plan is to provide for the supervision of court reporters in their relations with litigants as specified in the Court Reporter Act, including fees charged for transcripts, adherence to transcript format prescriptions and delivery schedules. The plan must also provide that supervision be exercised by a judge of the court, the clerk of court, or some other person designated by the Court.]

28 U.S.C. § 753. Reporters

(b) Each session of the court and every other proceeding designated by rule or order of the court or by one of the judges shall be recorded verbatim by shorthand, mechanical means, electronic sound recording, or any other method, subject to regulations promulgated by the Judicial Conference and subject to the discretion and approval of

the judge. The regulations promulgated pursuant to the preceding sentence shall prescribe the types of electronic sound recording or other means which may be used. Proceedings to be recorded under this section include (1) all proceedings in criminal cases had in open court; (2) all proceedings in other cases had in open court unless the parties with the approval of the judge shall agree specifically to the contrary; and (3) such other proceedings as a judge of the court may direct or as may be required by rule or order of court as may be requested by any party to the proceeding.

The reporter or other individual designated to produce the record shall attach his official certificate to the original shorthand notes or other original records so taken and promptly file them with the clerk who shall preserve them in the public records of the court for not less than ten years.

The reporter or other individual designated to produce the record shall transcribe and certify such parts of the record of proceedings as may be required by any rule or order of court, including all arrangements, pleas, and proceedings in connection with the imposition of sentence in criminal cases unless they have been recorded by electronic sound recording as provided in this subsection and the original records so taken have been certified by him and filed with the clerk as provided in this subsection. He shall also transcribe and certify such other parts of the record of proceedings as may be required by rule or order of court. Upon the request of any party to any proceeding which has been so recorded who has agreed to pay the fee therefore, or of a judge of the court, the reporter or other individual designated to produce the record shall promptly transcribe the original records of the requested parts of the proceedings and attach to the transcript his official certificate, and deliver the same to the party or judge making the request.

The reporter or other designated individual shall promptly deliver to the clerk for the records of the court a certified copy of the transcript so made.

The transcript in any case certified by the reporter or other individual designated to produce the record shall be deemed prima facie a correct statement of the testimony taken and proceedings had. No transcripts of the proceedings of the court shall be considered as official except those made from the records certified by the reporter or other individual designated to produce the record.

The original notes or other original records and the copy of the transcript in the office of the clerk shall be open during office hours to inspection by any person without charge.

APPENDIX E

READ INSTRUCTIONS ON BACK OF LAST PAGE BEFORE COMPLETING

TRANSCRIPT ORDER

Dist. Ct. No. **CV84-1786-L-0/0** District of **WESTERN DISTRICT OF LOUISIANA** Notice of Appeal Fld. Yes, Short Case Title **ABELL VS. POTOMAC, ET AL** Court Reporter **CONNIE EZELL**

PART 1. TO BE COMPLETED BY PARTY ORDERING TRANSCRIPT (Do not complete this form unless financial arrangements have been made. See instructions on back of last page).

A. Complete one of the following:

- Transcript is unnecessary for appeal purposes
- Transcript is already on file in Clerk's office
- This is to order a transcript of the proceedings heard on the dates listed below. (Specify exact dates of proceedings). If requesting only partial transcript of proceedings, specify exactly what portion or what witness testimony is desired.

December 8, 1986 - February 4, 1987

If proceeding to be transcribed was a trial, also check appropriate box below for special requests: otherwise, this material will NOT be included in trial transcripts.

Voir dire ; Opening statement of plaintiff defendant
Closing argument of plaintiff defendant
Jury instructions

B. I certify that I have contracted the court reporter and that satisfactory financial arrangements for payment of the cost of the transcript have been made. The method of payment will be:

- Private funds; Criminal Justice Act Funds (Attach copy of CJA Form 24 to court reporter's copy); Other IFP Funds;
- Advance Payment waived by reporter; U.S. Government Funds;
- Other _____

Signature _____ Counsel for
JOE E. FRYAR

(print Name) **J. MINOS SIMON** Telephone (318)233-4625

NOTE: FAILURE TO SPECIFY IN ADEQUATE DETAIL THOSE PROCEEDINGS TO BE TRANSCRIBED, OR FAILURE TO MAKE PROMPT SATISFACTORY FINANCIAL ARRANGEMENTS FOR THE TRANSCRIPT, ARE GROUNDS FOR DISMISSAL OF THE APPEAL.

PART II COURT REPORTER ACKNOWLEDGMENT (Read instructions on reverse side of copy 4 before completing).

| Date transcript
order received | If arrangements are not
yet made, date
contact made with
ordering party re:
financial
arrangements | Estimated
completion
date | Estimated
number of
pages |
|-----------------------------------|---|---------------------------------|---------------------------------|
| 4/16/87 | | 6/30/87 | 4,000 |

Satisfactory Arrangements for payment were made on 4/16/87

Arrangements for payment have not been made. Reason: Deposit not received Unable to contact ordering party Other (Specify) _____

4/30/87 Connie S. Ezell (318) 261-1374
Date Signature of Court Reporter Telephone

*Do not include estimated completion date unless satisfactory financial arrangements have been made or waived.

Copy 4-To be sent to Court Reporter of Part II and Transmittal
to U.S. Court of Appeals (5th Circuit),
600 Camp Street, New Orleans, LA 70130

APPENDIX F

READ INSTRUCTIONS ON BACK OF LAST PAGE BEFORE COMPLETING

TRANSCRIPT ORDER

Dist. Ct. No. **CV84-1786-L-0/o** District of **WESTERN DISTRICT OF LOUISIANA** Notice of Appeal Fld. Yes, **April 20, 1987**

Short Case Title **ABELL VS. POTOMAC, ET AL** Court Reporter **CONNIE EZELL**

PART 1. TO BE COMPLETED BY PARTY ORDERING TRANSCRIPT (Do not complete this form unless financial arrangements have been made. See instructions on back of last page).

A. Complete one of the following:

- Transcript is unnecessary for appeal purposes
- Transcript is already on file in Clerk's office
- This is to order a transcript of the proceedings heard on the dates listed below. (Specify exact dates of proceedings). If requesting only partial transcript of proceedings, specify exactly what portion or what witness testimony is desired.

December 8, 1986 - February 4, 1987

If proceeding to be transcribed was a trial, also check appropriate box below for special requests: otherwise, this material will NOT be included in trial transcripts.

Voir dire ; Opening statement of plaintiff ; defendant
Closing argument of plaintiff defendant

Jury instructions

B. I certify that I have contracted the court reporter and that satisfactory financial arrangements for payment of the cost of the transcript have been made. The method of payment will be:

- Private funds; Criminal Justice Act Funds (Attach copy of CJA Form 24 to court reporter's copy); Other IFP Funds;
- Advance Payment waived by reporter; U.S. Government Funds;
- Other _____

Signature **D. Mark Bienvenu** Counsel for Wright, Lindsey
D. Mark Bienvenu & Jennings and Valley
Forge Insurance Company

Date **April 22, 1987**

Telephone **(318) 232-9700**

NOTE: FAILURE TO SPECIFY IN ADEQUATE DETAIL THOSE PROCEEDINGS TO BE TRANSCRIBED, OR FAILURE TO MAKE PROMPT SATISFACTORY FINANCIAL ARRANGEMENTS FOR THE TRANSCRIPT, ARE GROUNDS FOR DISMISSAL OF THE APPEAL.

PART II COURT REPORTER ACKNOWLEDGMENT (Read instructions on reverse side of copy 4 before completing).

| Date transcript order received | If arrangements are not yet made, date contact made with ordering party re: financial arrangements | Estimated completion date | Estimated number of pages |
|--------------------------------|--|---------------------------|---------------------------|
| April 22 | | 6/30/87 | 4,000 |

Satisfactory Arrangements for payment were made on 4/22/87

Arrangements for payment have not been made. Reason: Deposit not received Unable to contact ordering party Other (Specify) _____

| | | |
|---------|-----------------------------|----------------|
| 4/30/87 | Connie S. Ezell | (318) 261-1374 |
| Date | Signature of Court Reporter | Telephone |

*Do not include estimated completion date unless satisfactory financial arrangements have been made or waived.

Copy 1-To be transmitted to U.S. Court of Appeals (5th Circuit), 600 Camp Street, New Orleans, LA 70130, upon completion of Part I

APPENDIX G

READ INSTRUCTIONS ON BACK OF LAST PAGE BEFORE COMPLETING

TRANSCRIPT ORDER

Dist. Ct. No. 84-1786 "0" District of WESTERN (LOUISIANA) Notice of Appeal Fld. April 20, 1987

Short Case Title **EDWARD ABELL, JR. V POTOMAC**
Court Reporter **CONNIE EZELL**

PART 1. TO BE COMPLETED BY PARTY ORDERING TRANSCRIPT (Do not complete this form unless financial arrangements have been made. See instructions on back of last page).

A. Complete one of the following:

- Transcript is unnecessary for appeal purposes
- Transcript is already on file in Clerk's office
- This is to order a transcript of the proceedings heard on the dates listed below. (Specify exact dates of proceedings). If requesting only partial transcript of proceedings, specify exactly what portion or what witness testimony is desired.

If proceeding to be transcribed was a trial, also check appropriate box below for special requests: otherwise, this material will NOT be included in trial transcripts.

Voir dire ; Opening statement of plaintiff defendant

Closing argument of plaintiff defendant

Jury instructions

B. I certify that I have contracted the court reporter and that satisfactory financial arrangements for payment of the cost of the transcript have been made. The method of payment will be:

- Private funds; Criminal Justice Act Funds (Attach copy of CJA Form 24 to court reporter's copy); Other IFP Funds;
- Advance Payment waived by reporter; U.S. Government Funds;
- Other N/A (costs to be divided between four defendants)

Signature Leslie R. Leavoy, Jr.

Counsel for ALL AMERICAN
SERVICES CO., LTD

(Print Name) LESLIE R. LEAVOY, JR. Telephone (318) 487-9537

NOTE: FAILURE TO SPECIFY IN ADEQUATE DETAIL THOSE
PROCEEDINGS TO BE TRANSCRIBED, OR FAILURE TO
MAKE PROMPT SATISFACTORY FINANCIAL AR-
RANGEMENTS FOR THE TRANSCRIPT, ARE GROUNDS
FOR DISMISSAL OF THE APPEAL.

Date MAY 6, 1987

PART II COURT REPORTER ACKNOWLEDGMENT (Read in-
structions on reverse side of copy 4 before completing).

| Date transcript order received | If arrangements are not yet made, date contact made with ordering party re: financial arrangements | Estimated completion date | Estimated number of pages |
|--------------------------------|--|---------------------------|---------------------------|
| | | | |
| | | | |

Satisfactory Arrangements for payment were made on
 Arrangements for payment have not been made.
 Reason: Deposit not received Unable to contact ordering party Other (Specify) _____

Date

Signature of Court Reporter

Telephone

*Do not include estimated completion date unless satisfactory financial arrangements have been made or waived.

Copy 1-To be transmitted to U.S. Court of Appeals (5th Circuit),
600 Camp Street, New Orleans, LA 70130, upon completion of Part I

APPENDIX H
United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK

May 18, 1987

Gilbert F. Ganucheaum Tel. 504-589-6514
Clerk 600 Camp Street
New Orleans, La. 70130

Mr. Leslie R. Leavoy, Jr.
Attorney at Law
711 Washington Street
Alexandria, LA 71301

No. 87-4260-ABELL -vs- Potomas Insurance Co.

Dear Mr. Leavoy:

The information contained in a letter from Connie Ezell to George Bauer of this office of May 8, 1987 conflicts with the information that you set out in your letter to me of May 6, 1987 that each of the four appellants would have a pro rata share of the cost of the preparation of the transcript in this cause. She now tells us that you are not ordering a copy of the transcript, but will borrow one of the other defendants' copies if necessary. We have no problem with that, so long as the other defendants know that they will then bear the cost of the transcript.

Very truly yours,

/s/ Gilbert F. Ganacheau
GILBERT F. GANACHEAU
CLERK

GFG/img

cc: Mr. J. Minos Simon

Mr. D. Mark Bienvenu

Mr. Phillip A. Wittman

Mr. Phillip H. W.
Ms. Connie Ezell

LAW OFFICE OF
J. MINOS SIMON,

1408 West Pinhook Rd.
Post Office Box 52116
Lafayette, Louisiana 70505
318-233-4625

May 21, 1987

Mr. Gilbert F. Ganauchea
Clerk, United States Court of Appeals,
Fifth Circuit
600 Camp Street
New Orleans, Louisiana 70130

RE: Edward C. Abell, Jr., et al vs Potomac Insurance Company, et al Appeal Number: 87-4260

Dear Mr. Ganauchea:

This will acknowledge receipt of your letter of May 18, 1987 addressed to Mr. Leslie R. Leavoy, Jr., Attorney at Law, Alexandria, Louisiana. This letter speaks to Mr. Leavoy's statement that, in lieu of a pro rata sharing of the costs of the preparation of the transcript in this cause, he, on behalf of his client, intends to borrow a copy of the transcript from one of the defendants.

My client has reached no such agreement with Mr. Leavoy or his client, All American Services. Nor does my client agree to a pro rata sharing of the costs in excess of one-fourth ($\frac{1}{4}$ th) of that cost.

This letter is written in response to your communication just mentioned and for the record.

JMS:jhr

Very truly yours,
J. MINOS SIMON

cc: D. Mark Bienvenu
Philip A. Witmann
Leslie R. Leavoy, Jr.
Connie Ezell

By: /s/ J. Minos Simon
J. MINOS SIMON

APPENDIX J
United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK

Gilbert F. Ganucheaup June 17, 1987 Tel. 504-589-6514
Clerk 600 Camp Street
New Orleans, La. 70130

Mr. Leslie R. Leavoy, Jr.
Attorney at Law
711 Washington Street
Alexandria, LA 71301

No. 87-4260-ABELL -vs- Potomas Insurance Co.

(USDC No. CA 84 1786 "O")

Dear Mr. Leavoy:

Reference Mr. J. Minos Simon's letter to me of May 21, 1987 in response to my letter to you of May 18, 1987. We need to know what your client's intentions are in connection with the pro rata sharing of the cost of the preparation of the transcript in this cause. If the appellant intends to refer to the evidence, it is the appellant's responsibility to include a transcript and make satisfactory financial arrangements with the reporter for the payment thereof. Therefore, it would seem that your client is in default of the rule with the appeal subject to dismissal under our Local Rule 42.3.

We are approving a 30 day extension to July 30, 1987 for the court reporter to complete the transcript. We need to know what your intentions are prior to that date.

Very truly yours,

/s/ **Gilbert F. Ganacheau**
GILBERT F. GANACHEAU
CLERK

GFG/jmg

cc: **Mr. J. Minos Simon**
Mr. D. Mark Bienvenu
Mr. Phillip A. Wittman
Ms. Connie Ezell

